New York University *and* Union of Clerical, Administrative and Technical Staff (UCATS) at NYU, Local 3882, NYSUT, AFT, AFL–CIO. Case 02–CA–120698

November 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On April 21, 2015, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, New York University, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union of Clerical, Administrative, and Technical Staff (UCATS) at NYU, Local 3882, NYSUT, AFT, AFL–CIO, regarding the effects of its decision to change the job duties and job descriptions of Access, Delivery and Resource Sharing Services (ADRSS) employees in the following bargaining unit:

> All full-time and regular part-time office clerical employees in Code 106, and all full-time and regular part-time laboratory/technical employees in Code 104, including those employees receiving tuition remission, and all "special" employees who have been employed for at least twelve (12) consecutive weeks and have worked an average of twenty hours or more per week.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain in good faith with the Union over the effects of changes in the job duties and job descriptions of ADRSS employees.

(b) Upon request by the Union, rescind the effects that were visited upon employees as a result of its failure and refusal to bargain with the Union over the effects of its decision to change the job duties and job descriptions of ADRSS employees.

(c) Within 14 days from the date of this Order, remove all adverse comments from the job evaluations of affected employees related to its failure and refusal to bargain with the Union, and within 3 days thereafter, notify the affected employees in writing that this has been done and that the adverse comments will not be used against them in any way.

(d) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The judge ordered the Respondent to rescind only the adverse effects of the changes visited upon the bargaining unit employees as a result of the Respondent's change in the job duties and job descriptions of the ADRSS employees. To restore more fully the bargaining power of the Union, we will modify the judge's remedy to order rescission of any of the effects, but only at the request of the Union. Cf. *Fresno Bee*, 339 NLRB 1214, 1216 fn. 6 (2003). Notwithstanding this added discretion, we agree with the judge that the Respondent should be required to remove all adverse comments from the job evaluations of affected employees related to its unlawful failure and refusal to bargain.

We shall also modify the judge's recommended Order to more closely conform to the Board's standard remedial language for the violations found. We shall substitute a new notice to conform to the Order as modified.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the Union of Clerical, Administrative, and Technical Staff (UCATS) at NYU, Local 3882, NYSUT, AFT, AFL–CIO, regarding the effects of our decision to change the job duties and job descriptions of Access, Delivery and Resource Sharing Services (ADRSS) employees in the following bargaining unit:

> All full-time and regular part-time office clerical employees in Code 106, and all full-time and regular part-time laboratory/technical employees in Code 104, including those employees receiving tuition remission, and all "special" employees who have been employed for at least twelve (12) consecutive weeks and have worked an average of twenty hours or more per week.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon request, bargain in good faith with the Union over the effects of changes in the job duties and job descriptions of ADRSS employees.

WE WILL, upon request by the Union, rescind the effects that were visited upon employees as a result of our failure and refusal to bargain with the Union over the effects of our decision to change the job duties and job descriptions of ADRSS employees.

WE WILL, within 14 days from the date of this Order, remove all adverse comments from the job evaluations of affected employees related to our failure and refusal to bargain with the Union, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that the adverse comments will not be used against them in any way.

NEW YORK UNIVERSITY

The Board's decision can be found at http://www.nlrb.gov/case/02–CA–120698 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rhonda Gottlieb, Esq., for the General Counsel.
Michael J. Volpe and *Sandi F. Dubin, Esqs.,* for the Respondent.
Yvonne Brown, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case 02–CA–120698 filed on January 15, 2014, by Union of Clerical, Administrative, and Technical Staff (UCATS) at NYU, Local 3882, NYSUT, AFT, AFL–CIO (the Union), a complaint and notice of hearing issued on April 30, 2014. The complaint alleges that New York University (Respondent) violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union regarding the effects of its decision to implement changes in the job duties of bargaining unit employees in Access Services at Respondent's Bobst library, including requiring those employees to train and perform work in areas other than those in which the employees had been exclusively assigned. The Respondent filed an answer denying the complaint's material allegations.[1] The trial in this case was held on December 16, 2014, and February 2–3, 2015, in New York, New York.

After the conclusion of the trial, the parties filed briefs, which I have read and considered. Based on those briefs, and the entire record in the case, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a not-for-profit education corporation, with an office and place of business located in New York, New York. I find, as Respondent admits, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. I also find, as Respondent admits, that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The Respondent employs about 1,500 clerical, administrative and technical employees. (Tr. 80.) These employees are classified by code based on the nature of their work, with clerical and administrative employees categorized as "Code 106" and technical employees categorized as "Code 104." Code 104 and 106 employees are represented by the Union, and their terms and conditions of employment are subject to a collective-bargaining agreement effective from November 1, 2011, through October 31, 2017. The recognition clause describes the bargaining unit as follows:

> All full-time and regular part-time office clerical employees in Code 106, and all full-time and regular part-time laboratory/technical employees in Code 104, including those employees receiving tuition remission, and all 'special' employees who have been employed for at least twelve (12) consecutive weeks and have worked an average of twenty hours or more per week. (GC Exh. 2, art. 1.)

The collective bargaining agreement contains the following management-rights clause:

> The operation and management of the University and the supervision and direction of employees are and shall continue to be solely and exclusively the functions and prerogatives of the University. All of the rights, functions and prerogatives of management which are not expressly and specifically restricted or modified by one or more explicit provisions of this Agreement are reserved and retained exclusively by the University and shall not be deemed or construed to have been modified, diminished or impaired by any past practice or course of conduct or otherwise than by express provision of this Agreement. Without in any manner limiting or affecting the generality of the foregoing, the right and power to select and hire all employees, to suspend, discipline, demote or discharge them for cause, to promote them to supervisory or other positions, to assign, transfer, supervise and direct all working forces, to maintain discipline and efficiency among them, to determine the facilities, methods, means, equipment, procedures and personnel required to conduct activities, to promulgate rules and regulations and to exercise the other customary functions of the University for the carrying on of its business and operations, are recognized as vested exclusively in the University. (GC Exh. 2, art. 39.)

Article 9 of the collective-bargaining agreement provides that each employee shall have a written job description. According to article 9, the job description "is intended to illustrate the kinds of tasks and levels of work difficulty required of the position and does not necessarily include all the related specific duties and related responsibilities of the position. It does not limit the assignment of related duties not mentioned." Article 9 also states that "[a] job description may be changed to meet the operating requirements of the unit, or to reflect changes which have occurred, such as the elimination or addition of specific duties." It further states that "[n]either the Union nor any employee may grieve or arbitrate with respect to the content or description of any job."

This case involves a department of about 30 bargaining unit employees who work in Respondent's Bobst library. (Tr. 134, 192.) They are identified as Access, Delivery, and Resource Sharing Services (ADRSS) employees. Within the ADRSS department, there are six subordinate units or departments: course reserves, circulation, stacks, library privileges, off-site processing and resources sharing, and delivery services. The job titles and descriptions of the employees reflect their departmental duties: Course reserves assistant, circulation assistant, library privileges assistant, resources sharing assistant, and delivery services assistant. Each unit or department has its own supervisor, and the ADRSS department is headed by Kristina Rose. (GC Exhs. 3, 5.)

2. Respondent changes ADRSS job descriptions and duties

On July 26, 2013, Respondent, by Barbara Cardeli-Arroyo, its assistant vice president for employee relations, sent an email

[1] The complaint issued on April 30, 2014, included an allegation that Respondent had also violated its bargaining obligation by failing to provide relevant information to the Union. After the Union requested permission to withdraw the portion of the charge supporting that allegation, the Regional Director ordered that this allegation of the complaint be dismissed. See Tr. 43–44.

to the Union concerning a new generalist job description for ADRSS employees. This email described the present organization of the department and stated that during the past "couple years," Respondent had created opportunities for cross-training employees to work in other units on a voluntary basis. The email stated that about half of the ADRSS employees had participated in was called the "staff sharing" program, and many had indicated in an informal meeting that they were satisfied with the experience. The email also stated that two new employees had recently been hired in new "blended" positions, which required the employee to work in two or three different units or departments, instead of only one. With this background, Respondent announced that it was revising all job descriptions for the ADRSS employees, resulting in one comprehensive job description titled, "Access, Delivery and Resource Sharing Services Assistant." The employees would henceforth be expected to work in two units, instead of one, on a regular basis, although most of their time would be spent in their current work unit. Respondent also announced that training for the employees under the new system would be provided, including so-called "shadow" training, where a newly assigned employee works side by side with an experienced employee in their second assigned department. New schedules would be coordinated between the originating and assigned unit supervisors. The email stated that the new job description would be introduced in an all-staff meeting in early September 2013. (GC Exh. 3.)

Union Representative Linda Wambaugh immediately responded to Cardeli-Arroyo's email with an email of her own. She stated that the changes set forth in Cardeli-Arroyo's email constituted a unilateral change in working conditions, and requested bargaining over the matter. (GC Exh. 3.) In addition, on July 31, 2013, Wambaugh made a detailed information request concerning the changes and their impact. For example, she asked for information about the frequency of the proposed job sharing, scheduling and training matters, as well as the consequences for employees if their work performance did not meet expectations. (GC Exh. 4, Tr. 52–60.) Respondent provided a good deal of that information. (GC Exhs. 5, 6.)

On September 9, 2013, representatives of Respondent and the Union met regarding the changes in job duties for the ADRSS department employees. Present for Respondent were Attorney Sandi Durbin, Assistant Vice President of Human Relations Cardeli-Arroyo, and Human Resources Officials Enrique Yanez, Jackie Crow, and Nicholas Saul Minott. Present for the Union were Wambaugh, Vice President Christopher Crowe, and Union Shop Steward Jasmine Smith. The union representatives questioned management regarding the impact of the changes, including whether staffing would be reduced and how employees would be assigned to different departments. The union representatives also asked about employee evaluations, separate supervision, and the treatment of requests for leave or time off. Respondent's officials provided only general answers, and most of the questions were referred to ADRSS Department Head Kristina Rose, who did not attend the meeting. (Tr. 63–64, 152–153.)

On September and October 2013, Wambaugh sent other information requests to the Respondent; she testified that the requested information was necessary to determine the impact of the changes. The Respondent provided information in response to these requests, although it appears that the Union was not altogether satisfied. (GC Exh. 7, 8, 9, 10; Tr. 65–69.) However, Respondent provided sufficient information that the Union withdrew the refusal to provide information component of the charge, and the complaint's allegations that Respondent unlawfully failed to provide the Union with relevant information about the changes in job duties were subsequently dismissed.

3. Implementation of the changes

On November 26, 2013, Department Head Rose spoke to assembled ADRSS employees and gave them a power point presentation about the changes that were being implemented. The new duties were described in the following job description, titled, Access Delivery & Resource Sharing Assistant:

> Provide customer service & support across public service desks and ADRSS units in accordance with library polices (sic) and workflows. ADRSS Assistants will be assigned to work in other units on a regular basis to meet workflow demands. Duties include but not limited to: facilitating user services, circulating library materials, processing fees and payments, processing user requests and determining user privileges. Respond to user and visitor inquiries in-person, over the telephone, and via a variety of online environments. Assign and train part-time staff to assist with routine operations of ADRSS units.

The presentation emphasized that hours and days of work, home department, attendance policies, and grade of work would not change. (GC Exh. 11.)

Rose explained that the employees would be assigned to work in a secondary unit from 8 to 14 hours per week, and that their secondary assignments had been determined based on prior staff-sharing experiences and performance goals. She said that the training plan consisted of a 3-week cycle. During the first week, the employee would undergo training with the new unit supervisor for 15 hours, and during the second week the employee would "shadow" an employee from the new unit. During these first 2 weeks training might require the employee to modify his or her schedule. The third week of training would involve the employee's working regularly in the new unit. (GC Exh. 11.)

In response to questions from employees, Rose indicated that the employees were expected to perform at the same level as the recently hired blended employees, who had worked in several different units from the inception of their employment. She also said there would be no increase in compensation for the employees' undertaking their additional duties in the new units. (Tr. 160–161.) At the conclusion of the meeting, the employees were informed of their secondary unit assignments and met with their secondary supervisors. Training in the new duties in accordance with Respondent's directive began in January 2014. (Tr. 161–162.)

4. The formal request and refusal to bargain and initial Board proceedings

On November 27, 2013, the Union, by Wambaugh, formally demanded bargaining over the change in job duties. (GC Exh. 9.) Respondent, by its attorney Dubin, responded on December

13, 2013, that it was not required to bargain regarding the issue, because the Union had waived its rights in this respect given the broad management-rights and job description clauses contained in the collective-bargaining agreement. (GC Exh. 10.)

The original charge in this case was filed by the Union on January 15, 2014. It alleged that Respondent had unilaterally changed terms and conditions of employment by requiring employees to cross-train and rotate work assignments without bargaining "concerning such requirement or its effects." As indicated above, the complaint only alleges an unlawful refusal to bargain regarding the effects of such changes, not the decision itself. The Union appealed the Regional Director's failure to issue a broader complaint, including the decision to make the changes, to the General Counsel's Office of Appeals in Washington, D.C. On June 17, 2014, the Office of Appeals denied the appeal, stating that, by agreeing to the management-rights clause in the collective-bargaining agreement, the Union had waived its right to bargain over the decision to make changes in the job duties of the employees involved. Thus, the Office of Appeals concluded that "further proceedings not included in the complaint are unwarranted." (R. Exh. 1.)

5. The impact of the changes on ADRSS employees

The changes in job duties did not result in changes in the affected employees' pay or benefits. Nor did they alter the employee's primary supervisor, who approved requests for time off and schedule changes. And the record does not show that there have been any layoffs of ADRSS employees.[2] However, it is clear that the employees were assigned regularly to additional duties which they had not previously performed, as Respondent readily admits. Posthearing brief for Respondent at 12. This created problems not only during the 3-week training period beginning in January 2014, but also thereafter.[3]

Employee Jasmin Smith, who also served as the Union's steward, testified about the impact of the changes on her and on other ADRSS employees. Smith's primary assignment was in the circulation department, where she spent the majority of her workday at her desk and on a computer, answered phone inquiries, and handled credit cards, cash, and checks. (Tr. 163.) Her secondary assignment was in the stacks department, where she did very little work on a computer, but assisted people with locating books, and did the manual work of lifting, sorting, shifting, and shelving. (Tr. 162.) She also testified that she observed and trained employees whose secondary job was in the circulation department, but whose primary job left them ill-prepared for the circulation department work. For example, a stacks department employee who was not particularly proficient at computer work also had a medical condition that made it difficult for him to remain alert for the demands of the work in the circulation department. (Tr. 166.) Other employees had difficulty using the computer and handling money. One employee was so busy that he was unable to take his lunchbreak. (Tr. 168–171.) Documentary evidence confirms that employees complained among themselves about training issues connected with the job changes. See (GC Exh. 34.)

Documentary evidence also illustrates other effects of the changes and the Respondent's unilateral efforts to ameliorate them. On December 4, 2013, in an email to employees, Department Head Kristina Rose answered questions about whether employees had to share desks and computers with secondary employees assigned to their unit by stating, "we may need you to be a bit flexible." She informed employees in another response that they were responsible for communicating to secondary supervisors any schedule changes that had been cleared by primary supervisors. (GC Exh. 28.) Also, in December 2013, circulation department supervisors called for a meeting of employees to respond to their questions about their new roles and assignments. (GC Exhs. 20(a); 20(b).) And, on January 7, 2014, Rose emailed employees thanking them for their flexibility with schedule adjustments and their feedback. She stated that "[y]our duties in your current department will be adjusted to accommodate your working in another unit." (GC Exh. 23.) Furthermore, the record establishes that employees complained directly to supervisors and to Rose about their inability to complete their secondary work, and questioned whether their secondary assignment would have a negative impact on their evaluations or meeting their performance goals. (GC Exhs. 22, 24, 32.)

In July 2014, Respondent conducted performance reviews, which included comments about the work of employees in their secondary units. (R. Exh. 4; CP Exh. 2.) One employee was told that his progress at his "work share" assignment was "very slow regarding computer related training." The performance review noted that he was "struggling to learn the technology that is now a requirement of his job," and he was reminded that he was "required to do all aspects of his job description." (CP Exh. 2.) Thus, it is clear that the change in job duties had an impact on the evaluation process.

B. Discussion and Analysis

An employer is required to bargain with its employees' exclusive collective-bargaining representative when making a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining under Section 8(a)(5) of the Act. This obligation includes a duty to bargain about the "effects" on employees of a management decision that is not itself subject to the bargaining obligation. See *Allison Corp.,* 330 NLRB 1363, 1365 (2000); *Good Samaritan Hospital*, 335 NLRB 901, 902 (2001); see also *Heartland Health Care Center,* 359 NLRB No. 155, slip op. at 6 (2013), reaffd. 362 NLRB No. 3 (2015). As the Board has noted, in most such situations there are alternatives involving the effects of the employer's underlying decision that the employer and union can explore to avoid or reduce the impact of the change without calling into question the decision itself.

[2] The Charging Party, however, points out that there is some question as to how seniority for layoffs applies given the changes in job duties, as the agreement apparently defines seniority for layoffs in terms of length of service within a particular job title within an administrative unit. Posthearing brief for Charging Party at 18; GC Exh. 2, art. 15.

[3] Although Respondent points to testimony that not all employees consistently worked in secondary departments, it is clear that their job descriptions and duties contain that requirement, and it appears that all employees were trained to work in departments other than their own. Posthearing brief for Respondent at 14.

Good Samaritan Hospital, 335 NLRB at 903–904; see also *Fresno Bee*, 339 NLRB 1214 (2003).

The Respondent concedes that it refused to bargain over both the decision and the effects of the changes in job duties at issue here, but contends that the Union waived its right to bargain over those matters via the management rights and job descriptions clauses contained in the collective-bargaining agreement. However, it is settled law that the Board will find a waiver of the statutory right to bargain in the collective-bargaining agreement only if the contract language is specific regarding the right to bargain over the particular subject, and evinces a "clear and unmistakable waiver" *Allison Corp*., 330 NLRB at 1365; see also *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). Where a management-rights clause explicitly waives the right to bargain over a decision to change working conditions, but not its effects, the Board has found the contract's silence regarding the waiver of effects bargaining to be significant. *Allison Corp*., 330 NLRB at 1366; see also *Heartland Health Care Center*, 359 NLRB No. 155, slip op.at 6.

The Respondent also defends its refusal to bargain on the ground that the effects of any changes in this case were de minimis. However, it is clear that a change "affecting just one employee" can result in a violation of Section 8(a)(5). *Columbia College Chicago*, 360 NLRB No. 122, slip op. at 2 (2014), citing *Kentucky Fried Chicken*, 341 NLRB 69, 84 (2004) (rejecting claim that reduction in maximum courses taught by part-time faculty from three to two was insubstantial given loss of $100-cancellation fee and impact on part-time faculty schedules); see also *Fresno Bee*, 339 NLRB at 1215 (citations omitted) (changes in shift times, extension of lunch periods, and increases in breaktimes of only 5 minutes "material and substantial").

Applying the above principles, I find that the Respondent has not shown that the Union clearly and unmistakably waived its right to bargain over the effects of the changes in job duties it implemented in this case. I also find that the effects of the changes were not de minimis, but rather, they were substantial and material. Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over the effects of the changes it implemented in the job duties of the bargaining unit employees.

Regardless of whether the contract provisions discussed above establish that the Union waived its right to bargain over the decision to make the changes in job duties that Respondent effected here, they do not show a clear and unmistakable waiver by the Union of the right to bargain over the effects of any such decision. First of all, nothing in either the management rights clause or the job description clause relinquishes the Union's right to bargain over the effects of any changes in job duties. Nor do those clauses address training or evaluations, which, in this case, caused serious concerns on the part of employees. The record evinces a litany of employee complaints and concerns regarding not only training, but also how the employees would handle their new duties and how their performance of those other duties would affect their evaluations. The evidence establishes that the latter concern was justified, as at least one employee received negative comments regarding his secondary assignment in his 2014 performance evaluation. These complaints and concerns were separate and apart from Respondent's decision to alter the job duties of the bargaining unit employees in and of itself.

In addition, the record establishes that Respondent's supervisors and managers solicited feedback from ADRSS employees and addressed employee complaints by calling meetings, answering questions and making unilateral adjustments regarding issues that clearly involved the effects of the decision to change their job duties. Respondent concedes that it "solicited feedback from employees and adjusted training schedules and duties based on this feedback." It also concedes that it "addressed specific concerns raised by individual employees, when it was made aware of those concerns, including concerns that employees would be negatively evaluated during the learning curve for their new departments." Posthearing Brief for Respondent at 13–14. Those issues involving the effects of Respondent's decision were bargainable issues that easily could—and should—have included the employees' bargaining representative, which could have explored the alternatives that Respondent chose to explore unilaterally with the employees. Indeed, it was here that employees had the greatest need for union representation.[4]

Respondent makes much of the fact that the General Counsel's Office of Appeals agreed that the Union waived its right to bargain regarding the change in job duties, given the management rights clause in the contract. But that determination was limited to the decision rather than the effects of the changes in job duties. The Office of Appeals made clear that the remainder of the complaint, which dealt with the effects of the changes in job duties, could go forward. In any event, a determination by the Office of Appeals, an arm of the Board's public prosecutor, would not bind the Board in its judicial capacity to make an on-the-record decision as to whether the waiver applied to the effects of a decision to make changes in working conditions.

Respondent also relies heavily on the District of Columbia Circuit's decision in *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), refusing to enforce the Board's decision at 343 NLRB 470 (2004). In that case, the court rejected the Board's view, under the *Good Samaritan* case cited above, that effects bargaining is required notwithstanding a waiver of decisional bargaining on a particular subject. *Enloe Medical Center*, 433 F.3d at 839. However, the Board has since reaffirmed its commitment to the clear and unmistakable waiver standard in this regard, following a long-standing policy of refusing to acquiesce in decisions of the Courts of Appeals that are contrary to Board law. See *Heartland Health Care Center*, 359 NLRB No.155, at slip op. at 1, 6 fn. 1; see also *D.L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007); *Pathmark Stores, Inc.*,

[4] Contrary to Respondent's contention, the contract provision stating that the Union may not file a grievance or arbitrate with respect to job descriptions does not establish a waiver of its right to bargain the effects of a job description's change. Posthearing brief for Respondent at 23. It is settled that such a provision does not constitute a clear and unmistakable waiver. See *Bonnell/Tredegar Industries*, 313 NLRB 789, 791 (1994), enfd. 46 F.3d 339 (4th Cir. 1995) (exclusion of issue from grievance and arbitration procedure does not constitute a waiver of the bargaining obligation).

342 NLRB 378 fn. 1 (2004). As an administrative law judge, I am thus required to "apply established Board precedent which the Supreme Court has not reversed." *Pathmark Stores, Inc.*, supra; see also *Gas Spring Co.*, 296 NLRB 84, 97–98 (1989), enfd. 908 F.2d 966 (4th Cir. 1990).

Respondent further contends, somewhat obliquely, that it is relieved from any obligation to bargain over the effects of its decision to change the ADRSS employees' job duties because the Union never specifically requested effects bargaining as opposed to decisional bargaining regarding the issue. Posthearing brief for Respondent at 17–18. But that contention is without merit. The Union made no such distinction when it demanded bargaining, and its bargaining requests certainly encompassed both the decision and the effects. As early as the September 9 meeting with Respondents' representatives, union representatives questioned how the changes would affect evaluations, requests for leave and time off and supervision. (Tr. 63–64.) In addition, many of the Union's information requests were addressed to the impact of the changes in job duties rather than to the decision itself. Moreover, in the charge filed with the Board that initiated these proceedings, the Union was quite specific in alleging that Respondent unlawfully refused to bargain over both the decision to change the job duties of bargaining unit employees and the decision's effects. Thus, under the circumstances, it is clear that the Union's request for bargaining over the job changes included bargaining regarding the effects of the decision as well as the decision itself. See *Rochester Gas & Electric Corp*., 355 NLRB 507 (2010), enfd. sub nom. *Electrical Workers Local 36 v. NLRB*, 706 F.3d 73 (2d Cir. 2013), cert. denied 134 S.Ct. 2898 (2014)**;** see also *Heartland Health Care Center*, 359 NLRB No. 155, slip op. at 6.

Nor were the effects of the changes in job duties de minimis, as Respondent contends. The changes meant that employees were required to receive training in new duties and to work in unfamiliar jobs for at least part of their workweek, under different supervisors. Their performance in their new duties would be assessed in their evaluations. And, as shown above, there were numerous adjustments that had to be addressed by Respondent and the employees. At one point Department Head Rose asked the employees to be "flexible" in making those adjustments. The fact that Respondent took the time and effort to address these issues confirms that the effects of the job changes were not insignificant. In these circumstances, it is clear that the effects of the job changes were sufficiently substantial and material to require bargaining.

CONCLUSIONS OF LAW

1. Respondent New York University is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union of Clerical, Administrative, and Technical Staff (UCATS) at NYU, Local 3882, NYSUT, AFT, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing and failing to bargain with the Union over the effects of its decision to change the job duties and descriptions of ADRSS employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. The above violation is an unfair labor practice affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in an unfair labor practice, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Although the Charging Party requests an order restoring the status quo ante, I find that such an order is not possible given that Respondent acted lawfully in making the changes in the job duties and job descriptions of the ADRSS employees. See *Columbia College Chicago*, 360 NLRB No. 122, slip op. at 3 fn. 11. As a result, I shall issue an order requiring that Respondent rescind all adverse effects of the changes visited upon the bargaining unit employees, including removing any adverse comments regarding employee work performance related to the changes which appear in employee work performance evaluations.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[5]

ORDER

The Respondent, New York University, New York, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing and failing to bargain with the Union regarding the effects of its decision to change the job duties and job descriptions of ADRSS employees in the bargaining unit represented by the Union.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Upon request, bargain in good faith with the Union over the effects of changes in the job duties and descriptions of ADRSS employees.

(b) Rescind all adverse consequences that were visited upon employees as a result of its refusal and failure to bargain over the effects of its decision to change the job duties and descriptions of ADRSS employees, including the removal of any adverse comments related to such refusal and failure in the job evaluations of affected employees.

(c) Within 14 days after service by the Region, post, at its facility in New York, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the

[5] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[6] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by the Respondent at any time since January 15, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 21, 2015.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT refuse and fail to bargain with the Union over the effects of our decision to change the job duties and descriptions of ADRSS employees in the bargaining unit represented by the Union.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union over the effects of changes in the job duties and descriptions of ADRSS employees.

WE WILL rescind all adverse consequences that were visited upon employees as a result of our refusal and failure to bargain over the effects of its decision to change the job duties and descriptions of ADRSS employees, including the removal of any adverse comments related to such refusal and failure in the job evaluations of affected employees.

NEW YORK UNIVERSITY